

1 JEREMIAH J. DONOVAN AC-2091

2 MULE CREEK STATE PRISON

3 D.O. Box 409090

4 IONE, CA. 95640

5 IN PROPIA PERSONA

FILED

APR 11 2022

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DEPUTY CLERK

8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

12 JEREMIAH J. DONOVAN,  
13 PETITIONER,

CASE NO. 1:20-cv-00694-ADA-EPG

14 PETITIONER'S OPPOSITION TO  
15 RESPONDENT'S MOTION TO  
16 DISMISS.

17 KATHLEEN ALLISON, SECRETARY,  
18 CALIFORNIA DEPARTMENT OF CORRECTIONS  
19 AND REHABILITATION,  
20 RESPONDENT.

23 PETITIONER, JEREMIAH J. DONOVAN, RESPECTFULLY  
24 SUMMITS THE FOLLOWING OPPOSITION TO RESPONDENT'S  
25 MOTION TO DISMISS PETITIONER'S SECOND AMENDED  
26 PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY.

28 DATED: April 4<sup>th</sup>, 2022

RESPECTFULLY SUBMITTED  
*[Signature]*

JEREMIAH J. DONOVAN, Petitioner

Page Number

## MEMORANDUM OF POINTS AND AUTHORITIES

## In Support of Petitioners' opposition

TO RESPONDENT'S MOTION TO DISMISS.

PETITIONER, JEREMIAH J. DONOVAN, WILL AND HARRY JOHNSON V. AVERY, 793 US 483 (1969), RESPECTFULLY SUMMITS THE FOLLOWING POINTS AND AUTHORITIES IN SUPPORT OF HIS OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PETITIONER'S SECOND AMENDED PETITION FOR WRIT OF MAPPAS CORPUS AS UNTIMELY. PETITIONER HEREBY ALLEGES, CONTENTS, AND ARGUES BY THIS VERIFIED PLEADING AS FOLLOWS.

7

## Introduction

1. Petitioner, pursuant to Dye v. Hoffmeyer,  
546 U.S. 1, 4 (2005), incorporates all the  
documents filed, and lodged, in the above-  
entitled matter, my reference as duly set  
forth herein.

a. Petitioner Alleges, Contains, and Argues That  
"THE VERY ESSENCE OF CIVIL LIBERTY CERTAINLY  
CONSISTS IN THE RIGHT OF EVERY INDIVIDUAL TO CLAIM  
THE PROTECTION OF THE LAWS, WHETHER HE RECEIVES  
AN INJURY." (MARSHALL V. MADISON, 5 U.S. 137, 163 (1803);  
ACCORD ART. I, §9, CL. 2, UNITED STATES CONSTITUTION.

### 3. PETITIONER TAKES EXCEPTION TO RESPONDENT

1 "DECLINE OF JURISDICTION OF UNITED STATES MAGISTRATE  
 2 JUDGE," DATED 7/22/22, ON THE GROUND THAT  
 3 RESPONDENT WAIVED OR FORFEITED THAT OPTION BY  
 4 WAITING ALMOST TWO YEARS TO MAKE THE REQUEST.  
 5 AND RESPONDENT HAS NOT OBJECTED TO THE  
 6 JURISDICTION OF THE MAGISTRATE JUDGE DECIDING  
 7 ANY PREVIOUS MATTERS UNDER 28 USC § 636  
 8 (b)(1)(C). (ECF NO. 2, 7, 9, 10, 11, 13, 18, 20.)

9 4. IN ADDITION, PETITIONER ALLEGES, CONTENDS, AND  
 10 ARGUES THAT RESPONDENT WAIVED OR FORFEITED  
 11 THE STATUTE OF LIMITATIONS DEFENSE BY NOT FILING  
 12 ANY OBJECTIONS TO PETITIONER'S MOTION FOR STAY AND  
 13 A HEARING PROCEDURE ALMOST TWO YEARS AGO. (ECF NO.  
 14 2, 9, 10, 11, 13; AND SEE PETITIONER'S "STATUS REPORTS",  
 15 1 TO 4.)

16 5. IN ADDITION, PETITIONER ALLEGES, CONTENDS, AND  
 17 ARGUES THAT RESPONDENT'S MOTION TO DISMISS SHOULD  
 18 BE REJECTED. (SEE UNITED STATES V. KAJAYAN, 8 F.3D 1315  
 19 (9TH CIR. 1993) ("THE PROSECUTOR'S JOB ISN'T JUST TO  
 20 WIN, BUT TO WIN FAIRLY, STAYING WELL WITHIN THE RULES")  
 21 ACCORD BERGNER V. UNITED STATES, 795 US 18 (1935).)  
 22 BECAUSE THE IMPEDIMENT UNDER 28 USC § 2244(d)  
 23 (1)(B), CREATED BY RESPONDENT HAS NOT BEEN  
 24 REMOVED. (SEE ECF NO. 19 AT "GROUNDS SIX" AT 29-32.)

25 6. IN OTHER WORDS, THE IMPEDIMENT CREATED  
 26 BY RESPONDENT CONTINUES BY SUPPRESSING THE  
 27 EXONERATORY EVIDENCE FROM THE DNA TEST RESULTS  
 28 OF THE EVIDENCE COLLECTED BY POLICE. (BRADY V. MARYLAND,

1 373 US 83 (1963) (holding that prosecutors have  
 2 a constitutional duty to turn over evidence that  
 3 might show defendant is innocent); Kyle v.  
 4 Whitley, 514 US 419, 437, 438 (1995) ("THE INDIVIDUAL  
 5 PROSECUTOR HAS A DUTY TO LEARN OF ANY FAVORABLE  
 6 EVIDENCE KNOWN TO THE OTHERS ACTING ON THE  
 7 GOVERNMENT'S BEHALF IN THE CASE, INCLUDING THE  
 8 POLICE."); See Imbler v. Pachtman, 424 US 409, 427,  
 9 N. 25 (1976) ("AFTER A CONVICTION THE PROSECUTOR  
 10 ALSO IS BOUND BY THE ETHICS OF HIS OFFICE TO INFORM  
 11 THE APPROPRIATE AUTHORITY OF AFTER-ACQUISSION OR  
 12 OTHER INFORMATION THAT CASTS DOUBT UPON THE  
 13 CORRECTNESS OF THE CONVICTION."); In re Lawley (2008)  
 14 42 CR. 411 (231, 1246 (same)); People v. Garcia (1993)  
 15 17 CR. APP. 411 1169, 1179 (REQUIRING, AS A MATTER OF  
 16 ETHICS, DISCLOSURE DURING HABEAS (CORPUS PROCEEDINGS)).  
 17

18 1. FURTHERMORE, PETITIONER ALLEGES, CONTENTS,  
 19 AND ARGUES THAT RESPONDENT'S MOTION TO DISMISS  
 20 PETITIONER'S SECOND AMENDED PETITION FOR WRIT  
 21 OF HABEAS (CORPUS (SAP)) AS UNTIMELY (MOTION TO  
 22 DISMISS ("MOTION")), SHOULD BE DENIED FOR THE  
 23 FOLLOWING REASONS.  
 24

## II

### Summary of Background

25 8. ON SEPTEMBER 5, 2014 PETITIONER WAS  
 26 CONVICTED BY A JURY OF ASSAULT WITH A DEADLY  
 27

1 WEAPON, A HEAVY DUTY MAG FLASHLIGHT. (SEE LOO.  
2 DOC. 1, 2 AT p.3.)

3 9. ON MARCH 21, 2017, AFTER THE CALIFORNIA  
4 SUPREME COURT DENIED REVIEW, PETITIONER'S  
5 JUDGMENT BECAME FINAL 90 DAYS AFTER THE  
6 EXPIRATION FOR FILING A PETITION FOR WRIT OF  
7 CERTIORARI WITH THE UNITED STATES SUPREME  
8 COURT. (LOO. Docs. 3-4; 128 USC § 2244(d)(1)(A).)

9 10. PETITIONER'S DEADLINE FOR FILING A FEDERAL  
10 HABEAS PETITION EXPIRED ON MARCH 21, 2018. (128 USC  
11 § 2244(d)(1)(A).)

12 11. FROM AUGUST 30, 2017 AND UNTIL DECEMBER 22,  
13 2021 PETITIONER SOUGHT REVIEW OF THE JUDGMENT, AND  
14 CLAIMS OF HIS CONSTITUTIONAL RIGHTS BEING VIOLATED, PURSUANT  
15 TO WHICH HE IS ILLEGALLY AND UNLAWFULLY INCARCERATED,  
16 IN THE CALIFORNIA COURTS. (SEE ECF NO. 19 AT 16-26; SEE  
17 ALSO LOO. Docs. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.)

18 12. ON MAY 14, 2020 PETITIONER CONSTRUCTIVELY FILED  
19 HIS INITIAL FEDERAL PETITION FOR WRIT OF HABEAS CORPUS,  
20 THAT WAS ASSIGNED CASE NO. 1:20-CV-00694-EPG-HC.  
21 (ECF NO. 1.)

22 13. IN ADDITION, PETITIONER REQUESTED A STAY AND  
23 APEXANCE PROCEDURE PURSUANT TO RHINES V. WEPER, 544  
24 U.S. 269 (2005) TO EXHAUST STATE COURT REMEDIES ON  
25 THE UNEXHAUSTED CLAIMS LISTED IN HIS MOTION. (ECF NO.  
26 2 AT 11-13.)

27 14. ON JUNE 15, 2020 THE MAGISTRATE JUDGE MADE  
28 FINDINGS AND RECOMMENDATION TO GRANT PETITIONER'

1 MOTION TO STAY AND TO GRANT PETITIONER LEAVE TO AMEND  
2 HIS INITIAL PETITION FOR HABEAS CORPUS. (ECF NO. 9.)

3 15. IN ADDITION, THE MAGISTRATE JUDGE ISSUED AN ORDER  
4 DIRECTING THE CLERK OF THE COURT TO ASSIGN A DISTRICT  
5 COURT JUDGE. (Ibid.)

6 16. THE HONORABLE DALE A. DROZD WAS ASSIGNED  
7 AS THE DISTRICT JUDGE TO DECIDE THE MERITS OF  
8 PETITIONER'S CLAIMS. (SEE ECF NO. 9.)

9 17. ON JUNE 29, 2020 PETITIONER SUBMITTED HIS  
10 OBJECTIONS TO THE MAGISTRATE JUDGE'S FINDINGS AND  
11 RECOMMENDATION. (ECF NO. 10.)

12 18. IN ADDITION, PETITIONER LODGED HIS FIRST AMENDED  
13 PETITION FOR WRIT OF HABEAS CORPUS THAT LISTED THE  
14 CONSTITUTIONAL CLAIMS THAT HAD BEEN, AND HAD NOT  
15 BEEN, EXHAUSTED TO THE CALIFORNIA SUPREME COURT.  
16 (ECF NO. 11.) ("MIXED PETITION")

17 19. ON MARCH 4, 2021 THE DISTRICT COURT JUDGE  
18 ADOPTED THE MAGISTRATE JUDGE'S FINDINGS AND  
19 RECOMMENDATIONS TO GRANT PETITIONER'S MOTION FOR  
20 STAY AND ABEYANCE PROCEDURE PURSUANT TO REEDERS  
21 v. WEBER, SUPER, 544 U.S. 269. (ECF NO. 13.)

22 20. IN ADDITION, BASED UPON THE DISTRICT COURT  
23 JUDGE'S ORDER, PETITIONER HAS FILED (4) FOUR "STATUS  
24 REPORTS" WITH THE DISTRICT COURT, AND RESPONDENT, THAT  
25 EXPLAINED HOW PETITIONER WAS EXERCISING "DUE  
26 DILIGENCE" FROM AUGUST 30, 2017 AND UNTIL  
27 DECEMBER 22, 2021, SEEKING REVIEW OF THE JUDGMENT,  
28 AND CLAIMS OF HIS CONSTITUTIONAL RIGHTS BEING

1 VIOLATED, BASED UPON THE "NEWLY DISCOVERED EVIDENCE"  
2 FROM THE DNA TEST RESULTS SHOWING PETITIONER IS  
3 "ACTUALLY INNOCENT" OF ASSAULT WITH A DEADLY  
4 WEAPON, IN THE CALIFORNIA COURTS. (SEE "STATUS  
5 REPORT" 1 TO 4; SEE ALSO ECF NO. 19 AT 16-26; LOC.  
6 DOCS. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.)

7 21. ON JANUARY 21, 2022 PETITIONER CONSTRUCTIVELY  
8 FILED HIS SECOND AMENDED PETITION FOR WRIT OF HABEAS  
9 CORPUS ("SAP"), WITHIN 30 DAYS OF THE CALIFORNIA  
10 SUPREME COURT DENYING HIS STATE HABEAS PETITION  
11 WITHOUT CITING ANY "PROCEDURAL BARS TO FEDERAL  
12 REVIEW, ON DECEMBER 22, 2021. (ECF NO. 18, 19; LOC.  
13 DOC. 14.)

14  
15 III

16 RESPONDENT ARBITRARILY AND ERRONEOUSLY CLAIMED  
17 THAT PETITIONER DID NOT FILE A STATE POST CONVICTION  
18 APPLICATION WITHIN THE LIMITATIONS PERIOD, AND THAT  
19 PETITIONER IS NOT ENTITLED TO STATUTORY AND/OR

20  
21  
22 FOOTNOTE 1: IN PETITIONER'S PETITION FOR REVIEW, FILED WITH  
23 THE CALIFORNIA SUPREME COURT ON AUGUST 19, 2021, PETITIONER  
24 SOUGHT LEAVE OF THE COURT TO PRESENT AND INCORPORATE HIS  
25 HABEAS CLAIMS AS A "PREDICATE TO INTELLIGENT RESOLUTION" OF THE  
26 QUESTION(S) PRESENTED AND ARE "FAIRLY INCLUDED WITHIN" THE  
27 QUESTION(S) PRESENTED. (LOC. DOC. 11 AT PP. 5, 14 FN. 1; LOC. DOC. 13.)  
28 PETITIONER'S STATE HABEAS WAS FILED WITH THE CALIFORNIA SUPREME  
COURT ON SEPTEMBER 13, 2021, BEFORE REVIEW WAS DENIED.  
(LOC. DOCS. 13, 12.)

## EQUITABLE TOLLING OF THE LIMITATIONS PERIOD.

42

22. RESPONDENT ARGUED THAT PETITIONER'S SAP SHOULD BE DISMISSED AS UNTIMELY BECAUSE PETITIONER FILED HIS SAP ON JANUARY 21, 2022, OVER (3) THREE YEARS AFTER EXPIRATION OF THE AEDPA'S 1-YEAR LIMITATIONS PERIOD ON MARCH 21, 2018. (MOTION AT 3-5.)

23. IN ADDITION, RESPONDENT ARGUES THAT PETITIONER IS NOT ENTITLED TO STATUTORY TOLLING, AND/OR EQUITABLE TOLLING, BECAUSE PETITIONER DID NOT FILE ANY STATE COLLATERAL ACTIONS WITHIN THE LIMITATIONS PERIOD. (See, AT 3-5, 4-5.)

24. In addition, Respondent argues that Petitioner is not entitled to a later trigger date of the limitations period under 28 USC § 2244(d)(1)(D). (Motion at 4.)

25. FURTHERMORE, RESPONDENT ARGUES THAT A HABEAS PETITION IS NOT A VEHICLE FOR PETITIONER TO SEARCH FOR EVIDENCE FROM DNA TEST RESULTS TO SUPPORT HIS CLAIMS OF HIS CONSTITUTIONAL RIGHTS BEING VIOLATED. (Id. at 4-5.)

26. PETITIONER TAKES EXCEPTION TO THE SUFFICIENCY  
OF RESPONDENT'S ARGUMENTS ON THE GROUND  
THAT THEY ARE "CONTRARY TO" CLEARLY ESTABLISHED  
FEDERAL LAW AS DETERMINED BY THE UNITED  
STATES SUPREME COURT.

28 27. In addition, the former denies any disputes

1 EACH AND EVERY ALLEGATION AND/OR ARGUMENT MADE  
2 BY RESPONDENT AS BEING ARBITRARY, UNREASONABLE,  
3 AND CLEARLY ERRONEOUS.

4  
5 .B.  
6

7 28. "THE TIME DURING WHICH A PROPERLY FILED  
8 APPLICATION FOR STATE POST-CONVICTION OR OTHER  
9 COLLATERAL REVIEW WITH RESPECT TO THE PERTINENT  
10 JUDGMENT OR CLAIM IS PENDING SHALL NOT BE  
11 COUNTED TOWARD ANY PERIOD OF LIMITATION." (28  
12 U.S.C. § 2244(d)(2).)

13 29. THE CORRECT INTERPRETATION OF 28 U.S.C.  
14 § 2244(d)(2) IS THAT WORD "STATE" APPLIES TO  
15 "POST-CONVICTION OR OTHER COLLATERAL REVIEW" ONLY  
16 IN STATE COURTS, NOT FEDERAL COURTS, TOLLS THE  
17 LIMITATIONS PERIOD. (ARTUZ V. BENNETT, 531 U.S. 4 (2000);  
18 DUNCAN V. WALKER, 532 U.S. 167 (2001); TILLEMAN V. LONG,  
19 259 U.S. 494 (9th Cir. 2001).)

20 30. PETITIONER HAS NO FEDERAL SUBSTANTIVE DUE  
21 PROCESS RIGHT TO OBTAIN DNA TESTING. (SKINNER V.  
22 SWITZER, 562 U.S. 521, 524-525 (2011).)

23 31. HOWEVER, PETITIONER HAS A PROCEDURAL DUE  
24 PROCESS RIGHT TO A VIABLE MECHANISM FOR OBTAINING  
25 SUCH TESTING. (Id.; SEE UNITED STATES V. DEWHOSTON,  
26 792 F.3d 1174, 1181-82 (9th Cir. 2015) (FEDERAL  
27 DNA ACT, 18 U.S.C. § 3600, ALSO ALLOWS FOR DNA  
TESTING).)

28 32. AS DESCRIBED IN GROUND FOURTEEN OF

1 Petitioner's SAP (ECF No. 19, "Ground Fourteen" at  
 2 121-140), Petitioner Relies upon MORRISON V.  
 3 PETERSON, 809 F.3d 1059, 1064-65 (9th Cir. 2015), to  
 4 Argued to the California Supreme Court Clearly  
 5 Established Federal Law as Determined by the  
 6 United States Supreme Court to Show that  
 7 Petitioner's Due Process Rights Under Dist. Atty.  
 8 for Third Judicial Dist. v. OSBORNE, 557 U.S. 52, 68  
 9 (2009); and/or Schlip v. DELO, 513 U.S. 293, 324, 327  
 10 (1995); House v. Bell, 547 U.S. 518, 536-537, 540-541  
 11 (2006), were violated by the trial court Arbitrarily  
 12 Denying Petitioner's MOTIONS FOR DNA TESTING AND  
 13 REQUEST FOR COUNSEL. (W.D. Doc. 11 at 5-31, 2-3.)  
 14

15 33. In addition, Petitioner Argued to the  
 16 California Supreme Court that a state post-conviction  
 17 discovery procedures will be upset "only if they are  
 18 fundamentally inadequate to vindicate the substantive  
 19 rights provided." (Id. at p. 25, citing MORRISON V.  
 20 PETERSON, SUPRA, 809 F.3d at 1064-65 (quoting OSBORNE,  
 21

22 FOOTNOTE 2: Petitioner DID inform the California  
 23 Supreme Court that the trial judge was Biased and  
 24 Denied Petitioner's MOTIONS FOR DNA TESTING AND HAD TO  
 25 Petition to COVER UP THE TRIAL JUDGE VIOLATING  
 26 Petitioner's CONSTITUTIONAL RIGHTS THAT RESULTED IN  
 27 THE WRONGFUL CONVICTION OF AN INNOCENT MAN. (ECF No.  
 28 19, "Ground Ten", "Ground Twelve", "Ground Thirteen", SEE  
 ALSO W.D. Doc. 11 at p. 5; W.D. Doc. 13, "Grounds Eight, Ten, & "A"),  
 10

1 Supra, 551 U.S. at 69.)

2 34. FURTHERMORE, PETITIONER EXHAUSTED STATE  
 3 COURT REMEDIES ON HIS "ACTUALLY INNOCENT" CLAIM,  
 4 AS WELL AS HIS OTHER CONSTITUTIONAL CLAIMS ENTITLING  
 5 PETITIONER TO HABEAS CORPUS RELIEF THE DISTRICT  
 6 COURT JUDGE DEEMS JUST AND PROPER. (LOD. DOC.  
 7 11, AT 13, 15-16, 22, 24-30; LOD. DOC. 13, 14; ECF NO. A.)

8  
 9 C.

10 35. PETITIONER ALLEGES, CONTENTS, AND ARGUES  
 11 PERSUANT TO WILM V. KHOLI, 562 U.S. 545, (2011),  
 12 THAT HIS MOTIONS FOR DNA TESTING AND FOR APPOINTMENT  
 13 OF COUNSEL UNDER CALIFORNIA PENAL CODE § 1405, SOUGHT  
 14 REVIEW OF THE PERTINENT JUDGMENT, AND CLAIMS OF  
 15 HIS CONSTITUTIONAL RIGHTS BEING VIOLATED RESULTING  
 16 IN THE WRONGFUL CONVICTION OF AN INNOCENT MAN,  
 17 FROM AUGUST 20, 2017 AND UNTIL DECEMBER 22,  
 18 2021 WHILE EXERCISING "DUE DILIGENCE" TO EXHAUST  
 19 STATE COURT REMEDIES, CONSTITUTE "POST-CONVICTION  
 20 OR OTHER COLLATERAL REVIEW" UNDER 28 USC § 2244  
 21 (d)(2). (Id. AT 552, 553, 547, 556 n.4; DUNCAN V.  
 22 WALKER, SUPRA, 551 U.S. AT 172, 175, 176; SEE MULSON  
 23 V. QUARTERMAN, 508 F.3D 236, 240 (5TH CIR. 2007) (PER  
 24 CURRIER) (MOTION TO TEST DNA EVIDENCE UNDER TEXAS  
 25 CODE OF CRIMINAL PROCEDURE, ARTICLE 64, CONSTITUTES  
 26 "OTHER COLLATERAL REVIEW" AND THIS TOLLS THE AEDPA  
 27 ONE-YEAR LIMITATIONS PERIOD); Cf. CAL. PENAL CODE §  
 28 1509.7 (d) (AN APPLICATION TO THE CALIFORNIA SUPREME

1 COURT FOR THE SUPERIOR COURT TO CONSIDER A MOTION  
 2 FOR FILING A SUCCESSIVE MOTION OR UNTIMELY INITIAL  
 3 MOTION FOR POSTCONVICTION REVIEW UNDER PENAL  
 4 CODE § 1509.7(a) IS NOT AN "APPLICATION FOR STATE  
 5 POSTCONVICTION OR OTHER COLLATERAL REVIEW WITHIN  
 6 THE MEANING OF 28 USC § 2244(d)(2).")

7 36. THEREFORE, PETITIONER ALLEGES, CONTENTS,  
 8 AND ARGUES PURSUANT TO DAY v. McDONOUGH,  
 9 547 US 198 (2006), PETITIONER IS ENTITLED TO  
 10 STATUTORY AND EQUITABLE TOLLING OF THE AEDPA  
 11 ONE-YEAR LIMITATIONS PERIOD FROM AUGUST 30, 2017  
 12 AND UNTIL DECEMBER 22, 2021, WHILE PETITIONER  
 13 EXERCISED "DUE DILIGENCE" SEEKING DNA TESTING OF  
 14 THE EVIDENCE COLLECTED BY POLICE TO SHOW THAT HE  
 15 IS "ACTUALLY INNOCENT" OF ASSAULT WITH A DEADLY  
 16 WEAPON, AND "BUT FOR" THE CONSTITUTIONAL ERRORS  
 17 (SEE ECF NO. 19), "IT IS MORE LIKELY THAN NOT THAT  
 18 NO REASONABLE JUROR WOULD HAVE FOUND  
 19 PETITIONER GUILTY BEYOND A REASONABLE DOUBT."  
 20 (McNURGIN v. PERKINS, 133 S. CT. 1924, 1933, 1935  
 21 (2013) (QUOTING *SETHUP v. DELO*, SUPRA, 513 US AT 329,  
 22 327); SEE DAY v. McDONOUGH, SUPRA, 547 US AT 201  
 23 (THE ONE-YEAR CLOCK IS STOPPED ... DURING THE TIME  
 24 THE PETITIONER "PROPERLY FILED APPLICATION FOR STATE  
 25 POSTCONVICTION RELIEF IS PENDING."); *FORD v. MOORE*, 296  
 26 F3D 1035, 1040 (11<sup>TH</sup> CIR 2002) (PER CURIAM) (THE FEDERAL  
 27 HABEAS STATUTORY LIMITATIONS PERIOD IS TOLLED REGARDLESS  
 28 OF WHETHER A PROPERLY FILED STATE POST-CONVICTION

1 Petition or other collateral review raises a federally  
2 cognizable claim); accord Tillman v. Long, *supra*,  
3 253 F.3d 494.)

4  
5 - D.

6 27. THEREFORE, BASED UPON THE FOREGOING  
7 REASONS THE DISTRICT COURT JUDGE SHOULD  
8 DENY RESPONDENT'S MOTION TO DISMISS PETITIONER'S  
9 SAP AS UNATTEMLY. (FED. R. CIV. P., RULE 12(F), (h).)

10  
11 IV

12 RESPONDENT ERRONEOUSLY CLAIMED THAT  
13 PETITIONER IS NOT ENTITLED TO A LATER  
14 TRIGGER DATE OF THE LIMITATIONS PERIOD  
15 UNDER 28 USC § 2244(d)(1)(D).

16  
17 A.

18 28. RESPONDENT ERRONEOUSLY CLAIMED THAT  
19 PETITIONER IS NOT ENTITLED TO A LATER TRIGGER DATE  
20 OF THE LIMITATIONS PERIOD UNDER 28 USC § 2244(d)(1)  
21 (D), BASED UPON THE DNA TEST RESULTS SHOWING PETITIONER  
22 IS "ACTUALLY INNOCENT", AS DESCRIBED IN PETITIONER'S  
23 SAP. (ECF NO. 19, "GROUND FIVE", "GROUND SIX", AND  
24 "GROUND FOURTEEN".)

25  
26 B.

27 29. THE CORRECT INTERPRETATION OF 28 USC §  
28 2244(d)(1)(D), ONLY REQUIRES THE HABEAS

1 Petitioner to exercise "due" or "reasonable"  
2 diligence in uncovering factual bases for "actual  
3 innocence" claim under Schlip v. DeLo. (See  
4 Spiliotes v. Evans, 622 F.3d 1173 (9th Cir. 2010).  
5 See also Lee v. Lampert, 657 F.3d 929 (9th Cir. 2011).)

6 40. IF THE PETITION ALLEGES NEWLY DISCOVERED  
7 EVIDENCE, THE FILING DEADLINE IS ONE YEAR FROM  
8 "THE DATE ON WHICH THE FACTUM PREDICATE OF THE  
9 CLAIM OR CLAIMS PRESENTED COULD HAVE BEEN  
10 DISCOVERED THROUGH THE EXERCISE OF DUE  
11 DILIGENCE." (McGuiggin v. Perkins, *supra*, 133  
12 SCt. at 1929 (quoting 28 U.S.C. § 2244(d)(1)(D)).)

13 41. Petitioner misrepresents, contends, and argues  
14 that AEDPA's one-year limitations period does  
15 not start until Respondent discloses the DNA  
16 test results of the evidence collected by  
17 Police. (SCARLETT v. Sec'y, 404 F.3d. Appx. 394 (11th  
18 Cir. 2010) (limitations period began date of the  
19 first DNA report, from which factum predicate  
20 could have been discovered); cf. Clark v. Oklahoma,  
21 468 F.3d 711 (10th Cir. 2006) (Petitioner failed to explain  
22 why documents held by state were necessary  
23 to pursue his federal claim, and he also did not  
24 show diligent pursuit of his claim even after  
25 receiving materials).)

27 C.

28 42. THEREFORE, BASED UPON THE FOREGOING

1 REASONS THE DISTRICT COURT JUDGE SHOULD DENY  
2 RESPONDENT'S MOTION TO DISMISS PETITIONER'S  
3 GAP AS UNTIMELY. (FED. R. CIV. P., RULE 12(F), (H).)

5 II.  
6 Conclusion.

8 43. THEREFORE, PETITIONER ALLEGES, CONTENTS,  
9 AND ARGUES PURSUANT TO BRACY V. GRAMEX,  
10 520 U.S. 899, 908-909 (1997), THAT THE DISTRICT  
11 COURT JUDGE SHOULD ORDER RESPONDENT TO COLLECT  
12 THE EVIDENCE FROM THE TUOLUMNE COUNTY SHERIFF  
13 DEPARTMENT (SEE ECF NO. 19 AT PARAGRAPH 406; 100 DOC  
14 11 AT PARAS. 12-13; SEE ALSO ECF NO. 19, EXHIBIT D  
15 AT PP. #5, #7-#8; EXHIBIT E AT PP. #1-#2), AND HAVE  
16 THE FBI LABORATORY CONDUCT DNA TESTS ON THE  
17 EVIDENCE, AND DISCLOSE THE DNA TESTS RESULTS  
18 TO THE DISTRICT COURT JUDGE, AND PETITIONER.  
19 (BRACY V. GRAMEX, SUPRA, 520 U.S. AT 908-909  
20 (GOOD CAUSE IS SHOWN WHERE "SPECIFIC ALLEGATIONS  
21 BEFORE THE COURT SHOW REASON TO BELIEVE THAT THE  
22 PETITIONER MAY, IF THE FACTS ARE FULLY DEVELOPED,  
23 BE ABLE TO DEMONSTRATE THAT HE IS ENTITLED  
24 TO RELIEF."); SIMS V. BROWN, 425 F.3d 560, 577 (9TH  
25 CIR. 2005); PHAM V. TERRYNE, 400 F.3d 740, 743 (9TH  
26 CIR. 2005) (A DISTRICT COURT ABUSES ITS DISCRETION IN  
27 NOT ORDERING DISCOVERY WHEN DISCOVERY IS "ESSENTIAL"  
28 FOR THE MATTER AS PETITIONER TO "DEVELOP FULLY" HIS

1 underlying (claim); McDaniel v. United States Dist.  
2 (Court, 127 F.3d 886, 888 (9th Cir. 1997) (District  
3 Court did not err in ordering discovery  
4 where petitioner's allegations of ineffective  
5 assistance of counsel were not purely speculative  
6 or unsupported by the record); see Jones v.  
7 Wood, 114 F.3d 1002, 1004, 1009 (9th Cir. 1997) (Jones  
8 claimed he was actually innocent and trial counsel  
9 failed to have the evidence (bloody clothing) tested  
10 for DNA, and Jones sought an order for  
11 the FBI lab to conduct tests on the clothes  
12 he was wearing the night of the murder);  
13 thus, the impediment under 28 U.S.C. § 2244(d)(1)(B),  
14 as described above in Paragraph 6, would  
15 be removed.<sup>3</sup>

16  
17  
18 DATE: April 4<sup>th</sup>, 2022  
19  
20

21 Respectfully Submitted  
22

23 

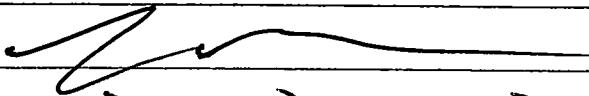
24 JEREMIAH J. DONOVAN, Petitioner  
25

26 FOOTNOTE 3: PURSUANT TO FED. R. CIVIL P., Rule 15(c), Petitioner's  
27 SAP "Relates Back" to May 14, 2020. (Mayk v. Felix, 545  
28 644, 664 (2005).)

1 Verification By Petitioner  
2

3 I, JEREMIAH J. DONOVAN, DECLARE UNDER THE  
4 PENALTY OF PERJURY, 18 USC § 1746, THAT THE FORE-  
5 GOING IS TRUE AND CORRECT BASED UPON MY OWN  
6 PERSONAL KNOWLEDGE, AND AS TO MATTERS BASED  
7 UPON INFORMATION I BELIEVE THOSE MATTERS (CITED  
8 AUTHORITIES) TO BE TRUE AND CORRECT.

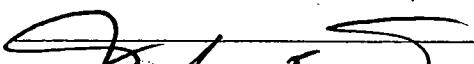
9  
10 EXECUTED ON THE 4<sup>TH</sup> DAY OF APRIL 2022,  
11 AT MULE CREEK STATE PRISON, FOLSOM, CA 95640.  
12

13   
14 JEREMIAH J. DONOVAN, Declarant.  
15

16  
17 Verification By Jailhouse Lawyer  
18

19 I, JEFFERSON F. SNOW K20414, DECLARE UNDER  
20 THE PENALTY OF PERJURY, 18 USC § 1746, THAT THE  
21 FOREGOING IS TRUE AND CORRECT BASED UPON MY OWN  
22 PERSONAL KNOWLEDGE FROM READING PETITIONER'S  
23 LEGAL PAPERS AND CITED AUTHORITIES.

24  
25 EXECUTED ON THE 4<sup>TH</sup> DAY OF APRIL 2022,  
26 AT MULE CREEK STATE PRISON, FOLSOM, CA 95640.  
27

28   
Jefferson F. Snow, Declarant

JOHNSON V. AVERY, SUPER. 93 US 483.

STATE OF CALIFORNIA

)

) SS

County of AMADOR

)

DONOVAN v. ALLISON

CASE NO. 1:20-cv-00694-DAD-EPG

[C.C.C. §§446, 2015.5; 28 U.S.C. §1746]

I, STEPHEN SNOW, K-20414, am a resident of the State of California and am over the age of eighteen years and am not a party to the above action. My address is listed below. Mule Creek State Prison:

PO BOX 409090  
IONE, CA 95640

On April 6<sup>th</sup>, 2022, I served the following documents:

*"Defended" opposition to Respondent's  
motion to dismiss.*

by placing a true copy thereof enclosed in a sealed envelope with First Class postage thereon fully prepaid in the United States mail by delivering to prison officials for processing through the Institution's internal legal mail system at Ione, California, addressed as follows:

UNITED STATES COURTS  
OFFICE OF THE CLERK, UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO, CALIFORNIA 93721-1318

STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE  
P.O. BOX 944255  
SACRAMENTO, CA 94244-2550

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed in the County of Amador, California on April 6<sup>th</sup>, 2022.

Pursuant to the holding of the United States Supreme Court in Houston v Lack 108 S.Ct. 2379, 487 U.S. 266, 101 L.Ed.2d 245 (1988) and FRAP, Rule 4(c) inmate legal documents are deemed filed on the day they are delivered to prison staff for processing and mailing via the Institution's internal legal mail procedures.